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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. ~~79-1105~~

MOUNTAIN LAUREL RACING, INC.,

KENNETH MARSHALL and JOHN KNIGHT,

Petitioners,

v.

WILLIAM FITZGERALD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 26, 1979.

OPINION BELOW

The opinions of the court of appeals are set forth as Appendix A hereto and are reported at 607 F.2d 589. The opinion and order of the district court are set forth as Appendix B hereto and are reported at 464 F. Supp. 263.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 26, 1979. A timely petition for rehearing en banc was denied by the court of appeals in an order entered on October 19, 1979 and amended on November 9, 1979. This petition for certiorari was filed within 90 days of both of the latter orders. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case presents two questions: whether certain conduct of a private corporation was action under color of state law and whether, if the conduct was state action, it resulted in a deprivation of liberty. The circuit court split 2 to 1 on both of these issues. Petitioner asserts that the conduct was not state action and that no liberty interest protected by the constitution was denied.

STATUTORY PROVISION INVOLVED

United States Code, Title 42, § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

This case was brought by a trainer and driver of harness race horses against the corporation which manages a harness horse racetrack, the race secretary at the track and a racing judge. The central issue in the case is whether the expulsion of the driver from the track by the private track management constitutes "state action" within the meaning of the 1871 Civil Rights Act, 42 U.S.C. § 1983, and, if so, whether the expulsion without a hearing was a denial of the driver's constitutionally protected rights.

The driver had a contract with the track management under which he obtained permission to use stall space for his horses free of charge. The agreement gave management the right to expel the driver and the right to compel him to remove his

horses from the stalls within 72 hours after being given notice to do so by the track operator. The track management decided to exercise its contract right to expel the driver because he was engaging, it believed, in driving practices which suggest fraud on the part of the driver. Those same practices are a violation of state harness commission rules and could have resulted in a suspension of the driver by the racing judges who regulate the conduct of races. Indeed this driver had been suspended for this very type of rule infraction earlier in the racing season. The track management decided to expel the driver immediately under the contract rather than institute more time-consuming proceedings against the driver before the racing judges or the state harness racing commission.

Before expelling the driver the track management met with the racing judges who had observed the driver's conduct. The judges are paid by the management to supervise and judge races. Present at the meeting was the race secretary, an employee of the track management who has, in addition to his work for management, certain functions set forth in state regulations with regard to the admission of horses to races. The judges and the race secretary are referred to in harness commission rules as "state racing officials." After confirming with the judges its impressions of the driver's wrongful conduct, management directed the race secretary to expel the driver in accordance with the 72-hour provision in its contract. The race secretary did so.

The driver quickly commenced this action, alleging that track management was engaged in state action, that he had been denied due process and that the court should enter preliminary and permanent injunctions. The preliminary injunction hearing was held four days after the complaint was filed. The district court found that the track management's conduct was state action because of the heavy regulation of its affairs by the state, that due process standards applied to the expulsion of the driver, and that, because those standards were not observed, the track management should be required, in a preliminary injunction, to permit the driver to continue to race and to stall his horses on the track premises. The track management, as well as the racing

judge and race secretary who were named as additional defendants, appealed.

The court of appeals confronted the questions of whether the state had so insinuated itself into the private track management's affairs that management's every act is state action and, if not, whether there was "a sufficiently close nexus" between the state and management's expulsion of the driver so as to cause the expulsion to "be fairly treated as that of the State itself" (quoting from Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)). The court of appeals found, correctly, that heavy regulation by the state did not destroy the essentially private character of the track management. It also found, correctly, that the track management had a private common law right to expel the driver from its premises and

that such expulsion would not involve state action. However, two of the three judges on the court of appeals panel found that the consultation between the track management and "state racing officials" prior to the expulsion created a "sufficiently close nexus" between the expulsion and the state to make the expulsion the act of the state. Petitioners sought reargument of this last point before the court en banc. Their petition was denied, with four circuit judges dissenting and indicating that they would have heard reargument.

The court of appeals also considered the question of whether the expulsion resulted in a denial of a liberty interest protected by the Due Process Clause. The majority found that the driver had "a

liberty interest in his employment reputation" and that the expulsion altered the scope of the driver's state license, denying him the opportunity to earn a livelihood. The dissent recognized that the driver was as fully licensed after the expulsion as before, that the driver's reputation was not affected by the expulsion, and that even if some stigma did attach as a result of the expulsion creation of such a stigma alone is not a denial of liberty.

REASONS FOR GRANTING THE WRIT

The Third Circuit majority opinion brings into question the scope of prior decisions of this Court with which the majority opinion is in direct conflict. The majority opinion is also in direct conflict with decisions of other circuits. To resolve these conflicts and to further clarify the scope and meaning of the state action concept, the Court should grant the writ.

I.

The majority opinion is in direct conflict with decisions in which this Court has held that a sufficient nexus is established between the state and a private action to give the private act the color of state law only when the state orders or overtly encourages the action:

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974); Flagg Bros., Inc. v. Brooks 436 U.S. 149, 165 (1978); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Peterson v. City of Greenville, 373 U.S. 244, 248 (1963). In the most recent of these cases, Flagg Bros., the Court found the sale of goods by a bailee not to be state action because the state "permits but does not compel" the sale. 436 U.S. at 165.

The Third Circuit majority creates a new kind of "nexus," one never discussed by this Court. Under this newly established Third Circuit rule, a private action is transformed into an act of the state if an interested state official, acting in his official capacity, "confirms" facts on which the private action was based.

Applying the new Third Circuit rule to earlier decisions of this Court, one is confronted with the inconsistency between the rule and established constitutional law. In Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), this Court dealt with a New York statute which gave a warehouseman the right to enforce his lien by selling goods entrusted to him for storage. It found that such a sale was not state action because statute merely created an optional self-help remedy and any sale under the statute could not "fairly be attributed to the State of New York." 436 U.S. at 157. Under the Third Circuit rule, apparently the action would have been attributable to the state if a state official had confirmed that the bailor was delinquent in paying the warehouseman and that the warehouseman was entitled to the

self-help remedy provided in the statute. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court dealt with a discontinuation by an electric utility of service to a customer who had failed to pay her utility bills. The discontinuation was authorized under a tariff filed by the utility and approved by the state public utility commission. This Court held that the utility's discontinuation of service was a private act, that state action was not involved, and that approval by the state of a private practice did not convert the private act into state action where the state did not order that the private action be taken. But under the Third Circuit rule the utility's action would have become a public act if the customer's nonpayment had been confirmed by a state official. These illustrations

establish that the Third Circuit rule goes beyond and is inconsistent with the law established by this Court, which recognizes private acts as acts of the state only when the state has compelled the private acts.

The Third Circuit rule conflicts with decisions in the Second, Fifth and Ninth Circuits. The Third Circuit has in this case established a standard of state involvement necessary to render a private act public which is lower than the standard recognized in other circuits. In the Third Circuit all that is necessary is some contact between the private actor and a quasi-public official having some state delegated interest in the contemplated act. In the other circuits the state must take the initiative; it must order or compel the private actor to act. The

higher standard recognized in other circuits conforms to the law enunciated by this Court, whereas the Third Circuit rule stands in conflict.

The Second Circuit in Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) and New York City Jaycees v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) found no state action because the state had not compelled the alleged sex discriminations of private entities.

The Fifth Circuit in Bailey v. McCann, 550 F.2d 1016 (5th Cir. 1977), dealt with the allegation by a harness racing driver that the state's requirement that drivers have a license from the United States Trotting Association made denial of a license by the association an act of the state. The Fifth Circuit found no state action in the denial because the "impetus"

for the denial was private. The Fifth Circuit also in Fulton v. Hecht, 545 F.2d 540 (5th Cir. 1977), held that a greyhound racetrack's refusal to renew a contract with a trainer was not state action in spite of heavy state regulation of the racetrack. Under the Fifth Circuit rule, the "impetus" for the challenged conduct must come from the state, and regulation by or consultation with the state is not sufficient to convert a private act to a public act. The Third Circuit says consultation is enough, even where the impetus was private.

The Ninth Circuit, like the Second and Fifth, requires that the state instigate the action if the otherwise private action is to be said to have been taken under color of state law. It would not be enough to create state action if the

private actor had sought out a state official to confirm the basis for his act. In Ouzts v. Maryland National Insurance Co., 470 F.2d 790 (9th Cir. 1972), representatives of a bail bondsman arrested an absconding defendant, as permitted by California law. The Ninth Circuit found that they did not act under color of state law but acted pursuant to a state license, the impetus of their action having been private. In Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975), a state regulated mortuary having a contract with the state was found not to have engaged in state action when it refused to provide mortuary services to Indians because the discrimination was not required by the state contract.

The Third Circuit majority's fundamental error lies in its failure to follow

the decisions of this Court which make clear the kind of "nexus" between the state and private conduct which creates state action. In Flagg Brothers and Jackson particularly this Court has held that private action acquires the color of state law if the state compels or orders the private actor to act. Short of state impetus or state compulsion, any incidental involvement of the state does not alter the private character of the act. In this case the private actor, the racetrack management, retained full discretion. It could expel the driver or not, as it chose. The expulsion of the driver was not the result of any state directive. The Third Circuit was in error in finding that private management's expulsion of the driver was state action.

II.

The current state of the law on protected liberty interests, where the alleged denial of liberty does not involve detention but involves assaults on reputation and employment opportunity, deserves clarification, and for this reason the petition should be granted. Assuming that the driver's expulsion was state action, was any liberty or property interest denied so as to give rise to a cause of action under the 1871 Civil Rights Act?

The facts of the case are, as always, crucial. The driver was licensed by Pennsylvania and by other states to drive in harness races. He was expelled from one track, The Meadows, in an act which we shall assume here was an act of the state. The act was one of expulsion, not of license suspension. The driver could have

raced under his license at any other track in the state or at any track in another state where he was licensed. After the expulsion the driver called other tracks and was told that he could not race at them because either they "didn't need his horses" or "his horses didn't fit there," not because of any diminution in the scope of his license. The license does not carry with it a right to race, but is only a certification of competence by the state. Any track is fully within its rights to refuse to permit a licensed driver to race.

The Third Circuit majority found that the driver had "a liberty interest in his employment reputation" and that the expulsion restricted the scope of the driver's license so as to deny him the opportunity to earn a livelihood. These

findings are contradicted by the facts just recited. The driver offered no proof that he was actually precluded from racing at other tracks due to some stigma arising from his expulsion. His complaint does not allege any injury to his reputation. The complaint alleges that he has been fully licensed at all relevant times. He was not denied the liberty to earn a livelihood by the expulsion, though as a practical matter he found it difficult to exercise that liberty at other tracks.

The Third Circuit majority relies on Bell v. Burson, 402 U.S. 535 (1971), Paul v. Davis, 424 U.S. 693 (1976), and Board of Regents v. Roth, 408 U.S. 564 (1972). Bell v. Burson dealt with state proceedings for the suspension of an automobile driver's license. The Court held that where suspension might result from such

state proceedings, due process was required. But in the present case no suspension proceedings were commenced. The driver was expelled from one racetrack but did not lose his license. In Paul v. Davis this Court found that though a significant alteration in state protection or licensing would require due process, "the interest in reputation alone which respondent seeks to vindicate in this action is quite different" and did not enjoy constitutional protection. 424 U.S. at 711. In Regents v. Roth this Court recognized that "liberty" is to be defined broadly in this context, but it found that no liberty interest was impaired when a state university dismissed a teacher after one year but took no other steps "that foreclosed his freedom to take advantage of other employment opportunities." 408

U.S. at 573. The driver in the present case has lost neither license nor livelihood nor liberty. The cases on which the Third Circuit relies are inapplicable.

The Third Circuit majority was in error in finding that track management's expulsion of the driver was state action, and in error in finding that the expulsion, assuming it to be state action, was a denial of liberty. The Third Circuit's holding is contrary to prior holdings of this Court, particularly in Paul v. Davis and Regents v. Roth. This Court should issue the writ to correct this inconsistency and to further clarify the concepts of state action and protected liberty under the fourteenth amendment.

CONCLUSION

Because of the significant departure taken in this case by the Third Circuit from established law regarding state action and protected liberty under the fourteenth amendment, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2460

WILLIAM FITZGERALD

v.

MOUNTAIN LAUREL RACING INC., KENNETH MARSHALL and JOHN KNIGHT, PRESIDING JUDGE,
Appellants

APPEAL FROM THE DISTRICT COURT OF THE
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH

D.C. Civil No. 78-0930

Argued June 7, 1979

Before ADAMS and ROSENN, *Circuit Judges*
and LACEY, *District Judge**

(Opinion filed September 26, 1979)

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* Honorable Frederick B. Lacey, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

ROSENN, *Circuit Judge*

We are required in this appeal to plunge once again into the murky waters of the state action doctrine underlying a civil rights action brought under 42 U.S.C. § 1983.[1] Specifically, we are asked to determine whether the act of a heavily state regulated private harness racing association in expelling a licensed trainer and driver from its track without a hearing, on the ground that the driver has violated a state harness racing commission rule, is state action for purposes of a section 1983 suit. The district court concluded that state action was present and granted a preliminary injunction enjoining the association from denying the driver access to its racetrack. We agree and affirm the order of the district court granting the preliminary injunction.

I.

Appellant Mountain Laurel Racing Inc., ("Mountain Laurel") is a private Pennsylvania corporation operated for a profit and licensed by the Pennsylvania State Harness Racing Commission ("Racing Commission") to conduct harness racing in the Commonwealth. Mountain Laurel, in order to conduct harness races, leases The Meadows Race Track, a privately owned facility near Washington, Pennsylvania.

Harness racing, as it is in most states, is a stringently regulated business in Pennsylvania. A private racing association engaged in pari-mutuel wagering, like Mountain Laurel, must be licensed by the State before it may conduct harness races. The officers, and even the stockholders of a private racing association are subject to Commission approval. The State derives substantial tax revenues from

1. 42 U.S.C. § 1983 provides: "Every person who, under color of any . . . regulation . . . of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

harness racing, collecting a percentage of the track's wagering income.[2]

Further, all of the individuals directly engaged in harness racing are state licensed. Drivers, trainers, grooms and owners of horses must be licensed by the Racing Commission before they may pursue harness racing. Racing associations like Mountain Laurel privately employ officials licensed by the State to enforce Racing Commission Rules at the private racetracks. Most notably, the racing associations defray the salaries of racing judges who oversee the conduct of the races and a racing secretary who performs certain administrative duties, specifically fixed by the Racing Commission, including the establishing of standards for horses.[3] Pennsylvania State Harness Racing Commission, Rules and Regulations, Rule 6, § 23 (1977). The presiding judge is charged by the Racing Commission with the task of enforcing the rules and regulations of the Commission, supervising all other licensed race officials, and with rendering daily records to the Commission of the activities and conduct of the race meetings. *Id.*, Rule 6, § 10.

Appellee William Fitzgerald is a licensed harness racing trainer and driver. At the beginning of the 1978 racing season, Fitzgerald had nine horses under his care to train and drive at the Meadows. Mountain Laurel has a policy by which it privately contracts to provide free stall space at the track to trainers and drivers as long as the horses are run in races and are managed according to the terms of the contract. This "stall agreement" must be first approved by the Racing Commission before it may be used by a racing association. The key provision in the stall agree

2. We were informed at oral argument that the State also participates financially by providing funds for the track's "breakage," *i.e.*, the State and the private track split the difference between the computer set odds and the actual mathematical pay-off to the bettors. The State also provides funds for the Pennsylvania Sire Stakes races conducted at various racetracks.

3. Although the private racing association pays the salaries of the racing judges, they are not employees of the association in an ordinary sense because they apparently perform duties only for the State Harness Racing Commission. The racing secretary, however, appears to perform some functions for both the Racing Commission and the private track.

ment is a clause by which Mountain Laurel reserves the unrestricted right to revoke the agreement upon giving the owner or trainer a 72 hour notice to vacate the premises.[4] The stall agreement also contains clauses reserving Mountain Laurel's rights to reject entry or eject from the Meadows individuals considered undesirable by it.[5]

Fitzgerald and Mountain Laurel entered into a stall agreement for the 1978 racing season. In March of 1978, Fitzgerald was suspended by the racing judges for "inconsistent driving," an offense under Rule 18, § 5 of the Racing Commission Rules & Regulations.[6] The gist of the offense is that the driver is not giving the best performance possible, which detracts from the quality of the race.

In August of 1978, Mountain Laurel suspected Fitzgerald of again engaging in inconsistent driving. On August 19, 1978, Mountain Laurel's management met with the racing secretary and the presiding racing judge. The racing officials confirmed management's impression that Fitzgerald was indeed engaging in inconsistent driving. Mountain Laurel decided to exercise its 72 hour option to vacate in the stall agreement and notified Fitzgerald to remove his horses from the track. The decision to exercise the option was conveyed to Fitzgerald later in the day in

4. The stall agreement provides in relevant part:

¶ 7 [Mountain Laurel] reserves the unrestricted right to deny any stall space, to revoke this permit, and/or to have any owner or trainer using any stall space or any other facilities at the Meadows vacate the same and to remove all horses, equipment and/or personnel from the premises of the Meadows, or from one assigned barn to another, at any time and for any reason, at the discretion of [Mountain Laurel], within 72 hours after receiving notice to vacate from [Mountain Laurel]. . . .

5. The stall agreement provides:

¶ 21 [Mountain Laurel] reserves the right to reject any entry.

¶ 22 [Mountain Laurel] may refuse admittance or to eject from the Meadows anyone considered undesirable by it.

6. Pennsylvania State Harness Racing Commission, Rules and Regulations (1977): Rule 18, § 5 *Fraudulent or Unsatisfactory Driving*

(c) In the event

(1) A drive is unsatisfactory due to carelessness or indifference, or

(2) is being raced in an inconsistent manner compared to an established pattern of prior performances, and the judges believe that there is no fraud, they may forthwith impose a penalty.

the presence of the racing judges by Kenneth Marshall, the racing secretary.

Fitzgerald instituted a lawsuit under 42 U.S.C. § 1983 on August 24, 1978, against Mountain Laurel, Kenneth Marshall the track racing secretary, and John Knight, the track presiding judge, alleging that the defendants had denied him due process of law in violation of the fourteenth amendment. Fitzgerald sought immediate as well as permanent injunctive relief to restrain the defendants from denying him access to the Meadows. The court treated the complaint as a request for a temporary restraining order under Fed. R. Civ. P. 65(b) and a preliminary injunction under Fed. R. Civ. P. 65(a). The court denied issuance of a temporary restraining order on August 24, 1978. On August 28, 1978, a hearing was held on the motion for a preliminary injunction at which time Mountain Laurel moved to dismiss the complaint on the ground, *inter alia*, that the state action prerequisite to the maintenance of a section 1983 action was lacking.

Mountain Laurel contended that its decision to exercise the 72 hour order to vacate in the stall agreement was a purely private act devoid of state involvement. The district judge disagreed, finding a sufficient connection between the State's involvement in harness racing and the challenged conduct to warrant a finding of state action under *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974). The district court granted Fitzgerald's motion for a preliminary injunction on August 31, 1978, enjoining Mountain Laurel from denying Fitzgerald "the right to stall horses, drive horses, train horses, and make other use of the facilities." Mountain Laurel thereafter filed a motion to invoke disciplinary procedures under the Rules and Regulations of the Racing Commission, proposing to afford Fitzgerald a hearing thereunder. The district court denied this motion on September 7, 1978. Mountain Laurel appeals from both the issuance of the preliminary injunction and the denial of its motion to invoke Racing Commission procedures.[7]

7. This Court has jurisdiction over the appeal from the order granting the preliminary injunction by virtue of 28 U.S.C. § 1292(a)(1). Jurisdiction over

II.

At the outset, we are presented with the possibility that this controversy is now moot. Fitzgerald did return to the Meadows after the grant of the injunction and he continued to train and race horses there until the close of the racing season in November 1978. At that time, Fitzgerald voluntarily left the track and there is no indication that he has returned.

We believe that the dispute between the parties is still alive. The preliminary injunction issued by the district court was not limited to the duration of the 1978 season. Under the protective aegis of the injunction, Fitzgerald could return to the Meadows at any time and demand that Mountain Laurel permit him to train and race horses there. It is an accepted legal principle that a controversy is not moot when it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 314-15 (1911); *Moreland v. W.P.I.A.L.*, 572 F.2d 121, 123 n.1 (3d Cir. 1978). In the present case, were we to dismiss this appeal as moot and should Fitzgerald return to the Meadows to train and race horses, the controversy would be revived and Mountain Laurel would have to seek review *de novo*. We believe, therefore, that this case fits the "capable of repetition, yet evading review" exception to the mootness doctrine. Accordingly, we proceed to the merits of this appeal.

III.

The core of this lawsuit is whether or not Mountain Laurel's eviction of Fitzgerald from the Meadows constituted state action sufficient to establish a jurisdictional basis for a section 1983 suit. The answer to this question turns on the precise nature of the State's relationship to Mountain Laurel in the factual context of this case.

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7. (Cont'd.)
the denial of the motion to invoke Racing Commission procedures is proper under 28 U.S.C. § 1292(a)(1) because the motion sought modification of the preliminary injunction.

Our starting point for an analysis of state action is *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). There, the Court found state action present in a racial discrimination case brought against a privately owned restaurant operated in a publicly owned and state subsidized parking garage. The test announced in *Burton* was simply that when the State has not clearly directed the private act of discrimination but where the private enterprise has a "symbiotic" relationship with the State, state action is present. The Court held:

> The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id. at 725. The Court, however, cautioned that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722.

The limits of the *Burton* symbiotic relationship test were subsequently explored in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in which the Court found no state action present in racial discrimination by a private club regulated by the Pennsylvania Liquor Control Board. The Court noted that the symbiotic relationship between state and private enterprise found in *Burton* was lacking in this case inasmuch as the Moose Lodge was a private social club operating in a private building. *Id.* at 175. Despite the pervasive nature of the regulations of private clubs by the State Liquor Control Board, the Court held that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." *Id.* at 176-77. The *Moose Lodge* case therefore stands for the basic principle that heavy state

regulation of a private entity does not necessarily give rise to a *Burton* symbiotic relationship so as to warrant a finding of state action "within the ambit of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 177.

The Supreme Court, however, continued to explore the relationship between extensively state regulated private enterprises and the commission of allegedly unconstitutional acts by them in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). That case involved a heavily regulated but privately owned utility company, which discontinued service to a customer without a hearing after she failed to pay her utility bills. The termination of service without a hearing did *not* constitute state action in violation of the fourteenth amendment. The Court held that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. The Court further held that:

> Approval by a state utility commission of a [termination] request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

Id. at 357. The "close nexus" test of *Jackson* posits that the State must be intimately involved in the challenged private conduct before that conduct becomes attributable to the State for purposes of a section 1983 action alleging a violation of the Due Process Clause of the fourteenth amendment.

There was some question after *Jackson* whether the "close nexus" test of that decision totally superseded the "symbiotic relationship" test of *Burton*. This Circuit concluded that *Burton* is still viable.[8] Judge Adams in *Braden*

8. The Supreme Court in *Jackson*, *supra*, 419 U.S. at 357, also discussed "the symbiotic relationship presented in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)" and seemingly left it intact.

v. University of Pittsburgh (Braden II), 552 F.2d 948, 958 (1977) (footnote omitted) explained:

> It may be that only in the absence of an inextricably-linked relationship between the state and a private entity does the "close nexus" test of *Jackson* come into play. Where a private enterprise stands, in its operations, as a veritable partner with the state, then it seems proper to hold such enterprise subject to the same constitutional requirements to which the state is accountable. But the situation may be otherwise where no pervasive state-private relationship exists. For without such an arrangement, there would be no basis for holding a private entity to constitutional strictures, unless the state is closely involved in the very activity challenged by a litigant.

Thus, it is possible that a symbiotic relationship between state and private enterprise could give rise to state action, or in the absence of such a relationship, state action still might be found if "the state is closely involved in the very activity challenged." *Id.*

IV.

The key facts of this case involve the narrow circumstances under which Mountain Laurel exercised its right to expel Fitzgerald under the terms of the stall agreement. The impetus for Fitzgerald's expulsion came from Mountain Laurel's renewed suspicion that Fitzgerald was engaging in "inconsistent driving," a violation of Racing Commission Rules for which he had been recently disciplined by the Commission. It is undisputed that prior to exercising its rights under the stall agreement, Mountain Laurel's management met with the presiding racing judge and racing secretary who confirmed the allegations of inconsistent driving against Fitzgerald. Plainly, the racing judges possessed delegated authority from the Commonwealth of Pennsylvania to discipline Fitzgerald for incon-

sistent driving following a hearing under the Racing Commission Rules. Yet no decision to suspend Fitzgerald was made at Mountain Laurel's meeting with the racing officials. Rather, from that meeting emanated Mountain Laurel's decision to evict Fitzgerald under the option to vacate in the stall agreement. The decision to evict Fitzgerald was communicated to him by the racing secretary, allegedly acting solely in his capacity as a representative of management, in the presence of the racing judges. These crucial facts provide the predicate to which we must apply the Supreme Court's pronouncements on state action to determine if state action is present.

Fitzgerald vigorously asserts that the very interrelationship of the State with private racing associations constitutes a "symbiotic relationship" like that involved in *Burton* and affords him the protective embrace of the fourteenth amendment. Although Mountain Laurel is a private corporation, Fitzgerald points to Pennsylvania's extensive regulation of racing operations requiring that track management and racing participants be licensed. Furthermore, Pennsylvania through its Racing Commission delegates significant authority to racing officials who, although privately employed by the racing association, nevertheless have broad authorization from the State to enforce Racing Commission rules. Pennsylvania also has a substantial financial interest in harness racing inasmuch as it collects tax revenues from the racing associations. Fitzgerald accordingly concludes that harness racing is essentially a joint venture between state and private enterprise in Pennsylvania and that a *Burton* symbiotic relationship is present.

Mountain Laurel responds by analogizing the harness racing business to the heavily regulated businesses in *Moose Lodge* and *Jackson* in which no state action was found. Like Moose Lodge No. 107, Mountain Laurel is a privately owned entity operating on private property. Heavy regulation by the Racing Commission, like the Liquor Control Board in *Moose Lodge* and the Public Utility Commission

in *Jackson*, is insufficient to establish a symbiotic relationship between the State and Mountain Laurel under *Burton* unless the regulation is so pervasive as to make Mountain Laurel's activities a joint venture with the State.

Mountain Laurel depends strongly on a Fifth Circuit case, *Fulton v. Hecht*, 545 F.2d 540 (5th Cir.), *cert. denied*, 430 U.S. 984 (1977) for the proposition that no symbiotic relationship exists between the State and a private racing association. That case rejected the contention that a symbiotic relationship existed between the State of Florida and a private dog racing club despite extensive state regulation, sharing of dog racing revenues and state auditing of the racetrack books. The kennel club in *Fulton* was, like Mountain Laurel, a private corporation. The club refused to renew a booking contract of a dog racer, who then sued under section 1983 to enjoin that act. The Fifth Circuit held:

> We think the dog racing industry can be analogized to the public utility situation. Because of the very nature of the industry, it must be regulated to protect the public. Even though the regulation might be extensive, it cannot, in any *realistic sense*, make the State a partner in the endeavors of the Kennel Club.

Id. at 542. (emphasis in original)

The Fifth Circuit emphasized that the kennel club was not a lessee of public property and that the financial benefits accruing to the State did not automatically convert private acts into state action. *Id.* at 542-43.

We agree with the Fifth Circuit that the State's relationship to the heavily regulated racing industry is not sufficient to establish a symbiotic relationship under *Burton*. Although we agree with the district court in this case that the State's relationship with Mountain Laurel is "decidedly more symbiotic" than the State's relationship with the public utility in *Jackson*, we do not think the relationship is one which makes the State a joint venturer with Mountain

Laurel. We cannot say that every act of Mountain Laurel is an act of the State. We therefore reject Fitzgerald's claim of state action under *Burton*.

This does not end our inquiry, however, because as Judge Adams stated in *Braden II*, there may be a close nexus between the State and the challenged private action sufficient to warrant a finding of state action under *Jackson*, even if a *Burton* symbiotic relationship is absent. We must therefore turn our analysis toward the nature and extent of the State's involvement in the expulsion of Fitzgerald under the stall agreement.

To establish the presence of state action under *Jackson*, Fitzgerald must show a sufficiently close nexus between the State's participation in harness racing and Mountain Laurel's act of expelling him so that Mountain Laurel's act "may be fairly treated as that of the State itself." *Jackson, supra*, 419 U.S. at 351. The key issue under *Jackson* is whether the State participated in the challenged conduct itself by "putting its weight" behind the challenged activity. Without such intimate involvement by the State in the private act, there is an insufficient nexus between state and private activity to warrant a finding of state action.

Mountain Laurel vigorously asserts that its act of expelling Fitzgerald derived solely from its common law property rights as a lessor to expel Fitzgerald under the terms of the stall agreement. Fitzgerald had been suspected of violating Racing Commission Rules prohibiting inconsistent driving. Management's confirmation of this suspicion at a meeting with State racing officials before expelling Fitzgerald does not, it asserts, transmute a private act into state action because it had the independent authority to expel Fitzgerald *for any reason* under the terms of the stall agreement. Mountain Laurel in essence posits two independent, concurrent spheres of disciplinary authority over individuals like Fitzgerald. On the one hand, the State delegates powers to racing officials to impose sanctions on drivers who do not comport with Commission Rules; on the other hand, a private racing association possesses common law property rights to exclude or expel any individual it considers undesirable. The key difference is that the State must provide a hearing comporting with the strictures of the Due Process Clause of the fourteenth amendment; a private association is under no such compulsion.

There can be little doubt that a private racing association like Mountain Laurel does possess private property rights.[9] *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D. N.J. 1956), *aff'd*, 242 F.2d 344 (3d Cir. 1957) (track may exclude a licensed jockey from racing at the track). Mountain Laurel's position is that its private property rights are broad enough to sanction exclusion of Fitzgerald even though it was the violation of Racing Commission Rules that triggered the exercise of those rights. Such an interpretation of the facts, however, ignores the pervasive presence and authority of the State in participating in Fitzgerald's summary expulsion.

The district court specifically found that

> [P]laintiff was suspended and evicted for allegedly violating a rule of the Pennsylvania State Harness Commission, an agency of the Commonwealth of Pennsylvania, that the defendants were specifically authorized by the state to enforce this rule, and that the

9. In fact, Pennsylvania's legislation regulating parimutuel *thoroughbred horse racing* activities in the State and the corporations engaged therein, specifically provides that any association licensed by the Commission "may refuse admission to and eject from the enclosure of the racetrack . . . any person" except for racial or other discriminatory reasons. Pa. Stat. Ann. tit. 15 § 2662.1(b) (Purdon Supp. 1978-79). Relying on statutory language empowering the State Horse Racing Commission or a racing association to deny or eject any person whose presence "in the sole judgment of the State Horse Racing Commission" is deemed detrimental to the best interests of racing, Pennsylvania's Commonwealth Court has held that the common law right of a race track to expel a patron without cause and without a hearing is abolished. Rockwell v. Pennsylvania State Horse Racing Commission, 327 A.2d 211, 213 (Pa. Commw. Ct. 1974). Asserting that the language of the thoroughbred horse racing statute is similar to the Harness Racing Act cited by the district court in this case, Pa. Stat. Ann. tit. 15 § 2610.1 (Purdon Supp. 1978-79), Fitzgerald argues that common law property rights of harness racing associations to evict persons have been eroded by the decision in *Rockwell*. *Rockwell* is helpful to Fitzgerald only to the extent that both statutes restrict private property rights by requiring a hearing in the event of an eviction of a licensed employee for conduct detrimental to the best interests of racing. Pa. Stat. Ann. tit. 15 §§ 2662.1(c); 2610.1 (Purdon Supp. 1978-79).

asserted concurrent basis of private authority neither attenuates nor mitigates this fact.

The district court further noted that the rental of stall space was not a prerequisite to driving and training horses at the Meadows.[10] Nonetheless, Mountain Laurel's act of expelling Fitzgerald from the stall space had the extreme effect of barring him from any activity at the track. Thus, the district court found that Fitzgerald's eviction "went far beyond a simple eviction from rented space." Indeed, the gravamen of Fitzgerald's complaint centers not on the denial of stall space but on the effect of the expulsion which prevents him from training and driving horses at the Meadows. Complaint ¶ 21. Mountain Laurel argues that there is neither an allegation nor an indication of any evidence that the State participated directly or indirectly in the demand that plaintiff leave the racetrack premises. We disagree.[11]

The findings of the district court manifest a close nexus between Pennsylvania's interest in regulating harness racing and Mountain Laurel's act of evicting Fitzgerald under the delegated authority to Racing Commission offi-

10. Drivers could race horses at the track without entering into any stall agreement. The district court observed that "[t]he parties agreed . . . that rental of stall space was not a prerequisite to *driving* and *training* horses at the Meadows and that many active drivers and trainers there keep their horses not controlled by Mountain Laurel." We find nothing in the record, however, to support this observation as to trainers.

11. The cross-examination of Kenneth Marshall, the racing secretary supports the finding of the district court that Fitzgerald was expelled for the violation of a Racing Commission rule:

> Q. So that you were not expelling him for the reason that he was a person who was undesirable under that statute or rule but only for management's reasons of wanting him off the track?
>
> A. No. I think while we were at the meeting that day in the morning that certainly these rules and regulations were discussed in that meeting, and these rules and regulations had the basis of our action, yes.
>
> Q. So that in essence what you are saying is that because of powers conferred upon you or for violations of the rules, you were expelling him?
>
> A. Yes, sir.
>
> MR. HERSHEY: Your Honor, I don't think that last question accurately reflects the witness' testimony.
>
> THE COURT: But his answer did.

Record at 109.

cials sufficient to establish the presence of state action under *Jackson*. Mountain Laurel may indeed possess common law property rights to evict for any reason whatsoever an individual from its track, but in this case, whatever private rights were exerted were specifically linked to the enforcement of Racing Commission Rules. Moreover, the district court found that Fitzgerald was suspended because "defendants felt that he had violated Commission Rule 18 § 5(c)(2) dealing with inconsistent driving." The sequence of events is crucial. Mountain Laurel's eviction of Fitzgerald came only *after* a meeting with the racing officials who confirmed the renewed allegations of inconsistent driving. Although the racing officials' salaries are paid by Mountain Laurel, it is undisputed that in rendering their opinion of Fitzgerald's conduct, they were acting pursuant to their delegated authority from the State to oversee the conduct of the races. Thus, Mountain Laurel's argument that two independent concurrent spheres of authority exist and that it acted solely in its private capacity, breaks down in light of the realities of the expulsion. As the district court noted, the defendants although claiming to have acted under a contractual right to evict from the rented stall, cited a Commission Rule violation when they acted and "went far beyond a simple eviction from rented space." The racing association was not empowered by the rule or statute to enforce the Commission Rules.

Mountain Laurel protests that the State had no authority to enforce the terms of the stall agreement and that the State did not "put its weight" behind the eviction. Mountain Laurel's argument misses the critical features of this case: the presiding racing judge and racing secretary, acting in their official capacities, *participated* in the decision to expel Fitzgerald.[12] In so doing, the racing officials "put

12. The dissent characterizes the judge's and secretary's activities as "consultations." We believe this conduct amounted to considerably more than mere consultations. *See* n.11 *supra*. Furthermore, Kenneth Marshall, the racing secretary, admitted on direct examination that he told Fitzgerald that:

> Mr. Knight [the presiding judge] and myself and management had met earlier in the day and that based upon three incidents one being a penalty

their weight'' behind the challenged expulsion by telling Mountain Laurel that Fitzgerald was violating Commission Rules and by approving the ensuing expulsion.

In *Jackson,* the Public Utility Commission's role in the termination of electrical service to the plaintiff was simply that it had approved a general practice authorizing termination under Metropolitan Edison's general tariff. 419 U.S. at 348. There was no other evidence of Commission participation in the termination of the plaintiff's electrical service. The Supreme Court appropriately concluded that the relationship of the Commission to the challenged act was too remote to transmute the private act into state action. In the present case, however, the State did more than merely adopt a regulation prohibiting inconsistent driving. Officials of the Racing Commission personally and actively participated in the specific conduct challenged by Fitzgerald. Their opinion as "racing officials and judges" of Fitzgerald's conduct precipitated the ensuing summary expulsion. This is hardly the remote action presented by *Jackson.* After carefully "sifting facts and weighing circumstances," *Burton, supra,* 365 U.S. at 722, we conclude that the totality of the circumstances demonstrate that Mountain Laurel's eviction of Fitzgerald must be fairly considered as the disciplinary act of the State.

We do not perceive the Fifth Circuit's holding in *Fulton* to be inconsistent with a finding of a close nexus in this case. In *Fulton,* the court declined to find a close nexus in the kennel club's refusal to renew the dog racer's booking contract because the State in no way regulates booking contracts and because the racer failed to show "that the state either directly or indirectly participated in the de-

12. (Cont'd.)
that happened earlier in the year and secondly, two cases in which, *in our opinion, racing officials and judges,* seemed to be a reoccurrence of inconsistent racing that management had expressed a concern and felt that it was detrimental to their business; and therefore, had requested that I pass the information along to Mr. Fitzgerald and that they were going to invoke their prerogative as in Paragraph 7 of the stall contract.
Record at 121-22 (emphasis supplied).

cision not to renew his contract." 545 F.2d at 543. By contrast, in this case, Pennsylvania must approve the stall agreement before it may be utilized,[13] and Fitzgerald has shown that the racing officials participated in management's decision to expel him. Thus, Fitzgerald has made out a convincing case of state participation in the challenged activity.

We wish to emphasize that not every private act of a racing association like Mountain Laurel will be considered to be state action. The dissent expresses considerable concern over potential restrictions on private management's ability to expel or fire an undesirable employee. It illustrates this concern with two examples of extensively regulated business, the one a commercial bank discharging an officer for misapplication of bank funds, a statutory violation, and the other a gambling casino discharging an employee for misconduct. In each instance, the employer has acted after conversations presumably with state investigators. The dissent interprets our holding as requiring that such an act be considered state action. However, the facts and the issue in the examples differ from the present case.

Mountain Laurel conceivably may have private property rights to expel an individual like Fitzgerald because it suspects a violation of Commission Rules which renders

13. The dissent focuses upon the State's approval of the stall agreement as the critical issue under the close nexus test. Dissent at 27-28 n.4. The State does approve the general terms of the stall agreement before it can be used. The dissent, however, asserts that pro forma approval of the stall agreement by the Racing Commission is insufficient by itself to establish a close nexus under *Jackson.* We do not disagree on this point. We agree if the State's participation were limited to a pro forma approval of the stall agreement, there conceivably would be no close nexus under *Jackson.* However, there is considerably more here to constitute state action.

The dissent distinguishes this case from Public Utilities Commission v. Pollak, 342 U.S. 451 (1952) in which the District of Columbia Public Utilities Commission's specific approval of the playing of radio programs on privately owned and operated streetcars and buses was held to be sufficient governmental action to allow first and fifth amendment claims to be brought. *Id.* at 462. But here, perhaps more than in *Pollak,* the Commission directly participated in the private conduct through the racing officials' meeting with management and by their activity in the decision to expel. We emphasize that it is the participation in the challenged activity which is the critical factor in establishing state action, and not the mere state approval of the stall agreement.

such an individual an undesirable participant in the track's races. We hold today that it is only when the state officials with delegated authority to enforce state laws or regulations *participate* with management in the decisional process to expel for a violation of a State Commission Rule is the requisite nexus under *Jackson* established.[14] The essence of state action is supplied by the presiding judge and racing secretary's meeting with management to analyze Fitzgerald's conduct and officially participating in reaching the decision to expel. In terms of the dissent's bank analogies, no official possessing delegated state authority participated with management in the decisional process to discharge the employee for misconduct in violation of state law. We perceive no question of a close nexus between state and private action when the private activity, totally independent of any official state participation, results in the discharge of a person for violation of state law.[15]

V.

Once state action is present, the requirements of due process must be met notwithstanding the concurrence of private action. When the two coalesce because of the exercise of the public power and participation by the State with

14. The district court also found state action present in the State's delegation of authority to hire private security guards who have power to enforce the criminal laws of the State at the private tracks. We note that this question was expressly left open by the United States Supreme Court in its most recent pronouncement on state action, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163-64 (1977). Because the record does not reveal that Fitzgerald was ejected by a private security guard, and because we have already found state action to be present, we need express no opinion on the issue reserved in *Flagg Bros.*

15. The dissent is concerned that our decision produces undesirable policy results. We do not so view our holding. Our holding means that state action is implicated when state officials in an extensively regulated industry participate and "put their weight" behind the challenged private act. Had Mountain Laurel acted independently without the racing officials having participated in the expulsion, our decision conceivably might have been different. Had an official of the State Liquor Control Board in *Moose Lodge* officially participated in the expulsion of Irvis, the patron, for racial reasons, or had a member of the Public Utility Commission in *Jackson* participated in the termination of electrical service, the courts might have found the requisite close connection between state and private action. Hence, we do not perceive any dire anomalies flowing from our holding today.

a private enterprise in the challenged activity, the resultant conduct must be characterized as state action requiring due process.

Even if the requisite state action is present to anchor jurisdictionally Fitzgerald's section 1983 claim for injunctive relief, we still must consider whether the district court properly granted that relief. In order to issue a preliminary injunction, the court must consider and weigh whether:

> (1) The plaintiff will suffer irreparable harm if relief is not granted.
>
> (2) The defendant will be harmed if relief is granted.
>
> (3) The public generally will be harmed if relief is granted.
>
> (4) The plaintiff is likely to prevail on the merits of his claim.

Delaware River Port Auth. v. Transamerican Trail. Tr., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974). The district court resolved these factors in favor of the plaintiff and issued the preliminary injunction. The court found: (1) Fitzgerald will suffer irreparable harm because the nature of harness racing is such that no adequate remedy exists at law to compensate him for losses to income and reputation sustained from an unlawful suspension. (2) There is no evidence that Mountain Laurel will be adversely affected if Fitzgerald is allowed to continue racing. (3) There is no evidence that the public will be similarly adversely affected. (4) Fitzgerald established a case of deprivation of due process under the fourteenth amendment.

We agree with the district court that Fitzgerald has established the possibility of irreparable injury "to his business and reputation" from an alleged violation of a Commission Rule implying dishonest racing to warrant a preliminary injunction. The record reveals that Fitzgerald's income was in large part directly related to his

ability to race at the Meadows. The eviction had the effect of denying him the right to pursue his license to drive and train horses. In *Bell v. Burson*, 402 U.S. 535, 539 (1971), the Supreme Court stated:

> Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

See Whetzler v. Krause, 411 F. Supp. 523, 527 (E.D. Pa. 1976), *aff'd*, 549 F.2d 797 (3d Cir. 1977). We also agree that this record reveals no evidence of grave harm to Mountain Laurel or the public resulting from Fitzgerald's continued activities at the track. The fourth factor, that of likelihood of success on the merits,[16] is more troublesome and requires an inquiry into whether Fitzgerald properly established a case of unconstitutional deprivation of his right to procedural due process under the fourteenth amendment.

Mountain Laurel contends that Fitzgerald can show no deprivation of procedural due process because he failed to exhaust administrative remedies available to him.[17] The district court held that no exhaustion of administrative remedies is required in section 1983 suits. *U.S. ex rel. Ricketts v. Lightcap*, 567 F.2d 1226, 1229 (3d Cir. 1977). Mountain Laurel relies on a footnote in *Lightcap* acknowledging a line of cases holding that where the plaintiff claims deprivation of property without due process of law, he must first use state processes open to him to redress the alleged deprivation. *Id.* at 1232 n.5. Mountain Laurel's reliance on this footnote is misplaced for two reasons.

16. Because we affirm the district court's finding of state action, any jurisdictional impediments raised by Mountain Laurel to Fitzgerald's success on the merits of his section 1983 claim are now rejected.

17. Specifically, Mountain Laurel argues that Fitzgerald could have filed a complaint under Rule 26, § 3 of the Racing Commission Rules or filed an appeal to the Harness Racing Commission under Pa. Stat. Ann. tit. 15, § 2610.1 (Purdon Supp. 1978-79).

First, the district court significantly found that it was Fitzgerald's *liberty* interest that was subject to constitutional deprivation. Second, *Lightcap* expressly declined to consider whether a qualified exhaustion rule should be adopted in this Circuit in cases of alleged deprivation of property rights without due process of law. *Id.* at 1231-32. When federal jurisdiction is invoked under section 1983 on the ground of fourteenth amendment violations, a plaintiff is not required to first exhaust his remedies elsewhere.[18] *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *Hochman v. Board of Ed. of City of Newark*, 534 F.2d 1094, 1097 (3d Cir. 1976).

We must then consider whether Fitzgerald adequately demonstrated the likelihood of a procedural due process violation. The district court, as we have just noted, found that Fitzgerald had a liberty interest in his employment reputation protected by the Due Process Clause of the fourteenth amendment. In addition, Mountain Laurel had officially recognized Fitzgerald's status as a state licensed trainer and driver by allowing him to perform these activities at the track. His summary expulsion significantly altered a "status previously recognized by state law," *Paul v. Davis*, 424 U.S. 693, 711 (1976), and denied him the opportunity of earning a livelihood. We, therefore, agree that Fitzgerald has a cognizable liberty interest under the Supreme Court's definition of liberty in *Paul v. Davis*, *supra*, and *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Judge Adams expresses concern whether Fitzgerald's liberty interest is implicated in this case. He doubts whether a stigma will be attached to Fitzgerald's business reputation because Mountain Laurel's decision to expel him need not be communicated to the Racing Commission and other racetracks under Commission Rule 23 § 8. We be-

18. Even if an appeal under the Commission rules was available from the decision to evict, there is a serious question whether the remedy would have been adequate. The Supreme Court has held, although in another context, that a deprivation of due process at the magesterial level is not constitutionally acceptable because the State offers an impartial adjudication on an appeal and trial *de novo* in the county court. The plaintiff is "entitled to a neutral and detached judge in the first instance." Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972).

lieve, however, that the dissent misreads this Rule which states: "Whenever a person is excluded from a track by an association, the Commission shall be notified. The Commission in turn shall notify all other associations in the Commonwealth of Pennsylvania and may notify the United States Trotting Association." The dissent asserts that there is no indication that Mountain Laurel did report or intended to report Fitzgerald's expulsion to the Commission. However, Mountain Laurel was required to so report, and we believe that it was reasonable for the district court to assume that such a report would be made. For purposes of a preliminary injunction, we believe Fitzgerald has established with a reasonable likelihood an injury to his business reputation.[19] The district court proceeded to consider whether Fitzgerald was accorded due process and concluded that he was not. It noted that due process generally requires a pre-suspension hearing unless some extenuating private or public interest of overriding significance exists to justify postponement. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). The district court concluded that because Fitzgerald was neither given a pre-eviction hearing, nor afforded a post-eviction hearing, his procedural due process rights were violated.[20] Thus, Fitz-

19. The dissent also avers that the complaint does not sufficiently allege damage to Fitzgerald's reputation. Dissent at 35-36. We believe that the complaint when viewed in the light most favorable to Fitzgerald adequately pleads a liberty interest. Fitzgerald's concern is that Mountain Laurel's actions deprive him of his "right to earn his livelihood." When broadly construed, it implicates his liberty interests. Complaint ¶ 27.

Finally, the dissent contends that no stigma can attach because Fitzgerald has not denied the truth of the charges leveled against him. Dissent at 36. However, there would be little reason to demand a hearing unless Fitzgerald desired to vindicate his reputation for the allegations of inconsistent driving. We believe that the denial of a hearing deprives him of the opportunity to deny the charges and that he has sufficiently shown injury to his business reputation to warrant preliminary injunctive relief.

20. Fitzgerald was expelled from the track on August 19, 1978, without a hearing. On August 24, he applied for a temporary restraining order which was denied. The district court fixed a hearing on the application for a preliminary injunction on August 28. Although eleven days had elapsed since the expulsion, no post-termination hearing had been proffered to Fitzgerald. Only after the preliminary injunction had been granted did Mountain Laurel make an offer of some form of post-termination hearing. The district court found that offer unacceptable for reasons discussed *infra*.

gerald showed a likelihood of success on the merits of his constitutional claim to warrant preliminary injunctive relief.

The district court's analysis of Fitzgerald's procedural due process claim may have been accurate at the time its opinion was delivered. However, we must reevaluate that analysis in light of the United States Supreme Court's recent decision in *Barry v. Barchi*, 47 U.S.L.W. 4812 (June 26, 1979). In that case, the Court held that a suspended harness racing trainer was not constitutionally entitled to a pre-suspension hearing, although a prompt post-suspension hearing was constitutionally required under the Due Process Clause of the fourteenth amendment. 47 U.S.L.W. at 4815. The question then is to what type of hearing would Fitzgerald be entitled under the Court's analysis in *Barchi*.

Unquestionably, Fitzgerald was given no pre-eviction hearing, but *Barchi* would under circumstances jeopardizing the integrity of the sport now make such a denial constitutionally permissible. Assuming *arguendo* that the State's interest in preserving the integrity of the sport required Fitzgerald's immediate suspension,[21] the sole issue then is whether Fitzgerald was afforded a prompt post-eviction hearing. *Barchi* indicates that a post-suspension hearing must proceed without delay:

> Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount. . . . We also discern little or no state interest and the State has suggested none, in an appreciable delay in going forward with a full hearing.

Id. Fitzgerald was offered no prompt post-eviction hearing at the time of his eviction. Once the district court issued

21. In the present posture of this case, we need not decide whether inconsistent driving in Pennsylvania poses such a serious risk to the integrity of harness racing and the public interest to justify immediate suspension without a hearing.

the injunction on August 31 prohibiting Fitzgerald's expulsion, Mountain Laurel filed a motion on September 1 to invoke procedures under the Harness Racing Commission Rules and Regulations.[22] In essence, Mountain Laurel then proposed to bring the charge of inconsistent driving before the racing judges, who after notice and a hearing, would decide whether Fitzgerald had violated Racing Commission Rules.

Fitzgerald opposed Mountain Laurel's motion on the ground that he could not get a fair hearing before the same judges who had participated in Mountain Laurel's decision to evict him. Fitzgerald proposed that Mountain Laurel instead commence proceedings under Rule 26 of the Racing Commission Rules by filing a complaint with the Commission. The Commission would then after notice and a hearing determine whether Fitzgerald had violated Commission Rules. At this hearing, Mountain Laurel's judges would only be witnesses and would not adjudicate Fitzgerald's rights. The district court agreed, denying Mountain Laurel's motion, but without prejudice to its institution of procedures under Rule 26.[23] The district court did not reach the issue of the constitutional adequacy of the Racing Commission's post-suspension hearing procedures themselves.

Mountain Laurel claims that the district court's denial of the motion to invoke Racing Commission procedures before the judges was an abuse of discretion. It argues that Fitzgerald would have received due process before the judges who would now be acting solely in their capacity as state officials. Mountain Laurel complains that the district court's action gave Fitzgerald a preferred status at the

22. Mountain Laurel did so in order to avoid any possible conflict with the preliminary injunction.

23. Judge Diamond stated: "I feel that to follow the procedure which you [Mountain Laurel] prescribe now after all that has transpired would make a mockery of what has transpired." Record at 27. The district court was also concerned with the constitutionality of having racing judges act as prosecutor, judge, and jury, but because the constitutionality of the Racing Commission procedures was not directly attacked, it did not reach this issue.

track, inasmuch as Fitzgerald could not be suspended by the racing judges for the alleged violations of inconsistent driving.

We perceive no abuse of discretion in the district court's order. It is very possible that Fitzgerald could not have received an impartial hearing before Mountain Laurel's judges after their participation in the decision to evict him. On the other hand, the district court left open an untrammeled avenue for a hearing before an impartial tribunal under Rule 26. The incidental preferred status afforded Fitzgerald by the district court's order was due only to Mountain Laurel's inability to afford him an impartial hearing and would last only as long as such a hearing was denied. We therefore affirm the district court's order denying Mountain Laurel's motion without prejudice to it to initiate procedures under Rule 26.

Thus, we cannot say that Fitzgerald was afforded the prompt post-suspension hearing envisioned by *Barchi*. This is not to say that had Mountain Laurel offered a hearing under Rule 26, that hearing would not have satisfied the requirements of *Barchi*. We need not reach that issue on the record before us. We hold only that Fitzgerald has adequately shown likelihood of success on his procedural due process claim to merit the issuance of the preliminary injunction.[24]

Having concluded that the requisite state action for a section 1983 suit was present, and that Fitzgerald has met the essential requirements for issuance of a preliminary injunction, the judgment of the district court is affirmed. Costs taxed against appellant.

24. The dissent is under the impression that the preliminary injunction requires the issuance of a stall agreement to Fitzgerald for future racing seasons, even though rights under the stall agreement were limited to 1978; that it extends beyond a period of time necessary to preserve the status quo ante and unduly burdens Mountain Laurel by "forcing [it] to issue a permit to a person whom it otherwise has the legal right to refuse." Dissent at 37. The order granting the injunction, however, is drawn much more narrowly as to time and is limited to a period "pending the final determination of this action or until further order of this court . . ." Until the final determination of the rights of the parties in this proceeding, the court has not adjudicated the future rights of the plaintiff to stall, and also to train or drive horses or to make other use of Mountain Laurel's facilities.

ADAMS, *Circuit Judge,* dissenting

William Fitzgerald, a horse trainer and driver whose at-will stall agreement was terminated by Mountain Laurel Racing, Inc. because it believed he was driving horses that had been racing inconsistently,[1] has brought this suit under 42 U.S.C. § 1983, a civil rights statute. To prevail under this enactment Fitzgerald must demonstrate that the defendants, under color of state law, deprived him of a constitutional right. The district court and now a majority of this Court have agreed with Fitzgerald that the termination of the stall agreement is properly termed, under the circumstances of this case, "state action."[2] They have also decided that the failure of Mountain Laurel and its officials to provide Fitzgerald with a hearing in connection with the termination of the stall agreement amounts to a deprivation of his liberty without due process of law—a constitutional violation. The majority does not address definitively, however, some of the problems inherent in the preliminary injunction itself. For the reasons set forth in this opinion, I respectfully dissent.

I.

The majority's description of this case as requiring yet another "plunge into the murky waters of state action doctrine" is quite apt. Few, if any, of the recent Supreme Court pronouncements on this subject have gone uncriticized; and, if the commentators differ about which precedents to assail and which to defend, there is virtual unanimity regarding the lack of a coherent state action doctrine.[3] This paucity of consistent principles makes any adjudication in this area difficult, particularly when, as is true here, the evidence adduced in the district court reasonably lends itself to varying interpretations.

1. Fitzgerald did not allege that Mountain Laurel terminated the stall agreement because *Fitzgerald* had been driving inconsistently. Rather, the complaint avers that Mountain Laurel acted "solely due to the allegation of inconsistency of the three horses." App. 9a. The distinction between "inconsistent driving" and "driving inconsistent horses" has been blurred throughout this litigation. The charge of "driving inconsistent horses" refers only to the performance of the *horses.* In contrast, "inconsistent driving" implies some degree of improper motive or lackadaisical behavior on the part of the *driver.* Because Fitzgerald claims only that Mountain Laurel suspected him of "driving inconsistent horses," this opinion proceeds on that basis.

2. The "under color of state law" requirement of section 1983 has been treated as essentially congruent with the "state action" requirement of the fourteenth amendment. *See, e.g.,* Braden v. University of Pittsburgh, 552 F.2d 948, 955 n.34 (3d Cir. 1977) (en banc) (listing authorities).

As the majority opinion demonstrates, two different approaches to the state action question might be applied here. First, it might be argued that state regulation of harness racing in Pennsylvania is so pervasive, and the relationship between the Commonwealth and the private racetracks so interdependent, that the acts of the track are inseparable from the acts of the government. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The question for resolution under such an analysis is whether a "symbiotic relationship" may be said to exist between Pennsylvania and its privately licensed racetracks.

Although the majority declares that the state's connections with Mountain Laurel are "decidedly more symbiotic" than was the state's relationship to the public utility in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), it decides that the claimed interdependence is not sufficient to meet the symbiotic relationship test. "We cannot say," the majority concludes, "that every act of Mountain Laurel is an act of the State." Majority opinion, *supra,* at 12. This position accords with that taken by the Court of Appeals for the Fifth Circuit in Fulton v. Hecht, 545 F.2d 540 (5th Cir.), *cert. denied,* 430 U.S. 984 (1977). Although the question is a close one, I am persuaded by the majority's reasoning that no symbiotic relationship exists here.[4]

3. *See, e.g.,* A. Bickel, The Supreme Court and the Idea of Progress 65-70 (1970); J. Nowak, R. Rotunda & J. Young, Constitutional Law 473-75 (1978); L. Tribe, American Constitutional Law § 18-2, at 1156-57 (1979).

4. Had the Pennsylvania Racing Commission specifically approved the terms of the stall agreement and their implications, there arguably would be state action under the doctrine of Public Utilities Commission v. Pollak, 343 U.S. 451 (1952). In *Pollak,* a passenger of the Capitol Transit Company, a District of Columbia railway and bus service, sued to enjoin the company from playing radio programs on its streetcars and buses. Plaintiff alleged that the programs violated his first and fifth amendment rights. Transit's operations were extensively regulated by the utilities commission; and the

The majority predicates its decision on the second approach, the "close nexus" test of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). It is from this proposition that I primarily diverge from the majority.

In *Jackson,* the Supreme Court, assessing whether a heavily regulated, privately owned utility company's termination of service to a customer was state action, held that "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* at 351. In this case, the majority concludes that the *Jackson* test is satisfied because "the presiding racing judge and racing secretary, acting in their official capacities, *participated* in the decision to expel Fitzgerald." Majority Opinion, *supra,* at 15 (emphasis in original; citation omitted). I believe that this application of *Jackson* to the facts of this case is incorrect. Further, I am concerned that today's decision might lead to an unprecedented degree of federal constitutional control over a broad range of heretofore private transactions.[5]

4. (Cont'd.)
commission investigated Transit's use of the radio programs, held public hearings, and concluded that the programs did not impair the public's safety, comfort, or convenience. The Supreme Court held that the commission's specific approval of Transit's actions caused the latter to be state action. *Id.* at 462.

In this case, although the Racing Commission received the stall agreement form, there is nothing in the record to suggest that the Racing Commission's review, if there was any at all, was anything but *pro forma.* Unlike the investigation in *Pollak,* the Commission did not "put its own weight on the side of the proposed practice." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). If there were evidence that the Commission carefully reviewed the terms of the stall agreement and signaled its approval of the terms on policy grounds, this Court could more readily infer that the Racing Commission sought to use the stall agreement to help enforce the state's goal of disciplining inconsistent drivers. Short of this kind of state involvement, the *Pollak* rationale would not appear to apply.

5. I am also concerned that the decision reached by the majority is contrary to the Supreme Court's recent refusal to define liberally state action in cases involving procedural due process claims. In both *Jackson* and Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), the Court declined to find state action in transactions between private companies and customers who alleged that they had been denied the procedural guarantees of the fourteenth amendment. I read these cases as signaling the Supreme Court's reluctance to impose federal constitutional standards on the *manner* in which private parties choose to deal with one another in a business context.

The hearings conducted by the district court revealed that Mountain Laurel and the Pennsylvania State Harness racing Commission each possess independent, though often complementary, authority over racetrack operations. The Commission is charged with establishing rules and regulations governing the conduct of races and with licensing drivers, trainers, and other racing personnel. The Commission licenses several racetrack employees, racing judges and a racing secretary, to enforce on a daily basis the rules and regulations of the Commission and to administer various Commission policies.[6] Commission Rule 18, section 5 authorizes the racing judges to discipline any driver who engages in inconsistent, careless, or indifferent driving.[7] In turn, Mountain Laurel retains primary responsibility over the track facilities, including the authority to contract privately to provide stall space and other services for racing personnel. Neither the Commission nor the secretary and judges have authority to intervene in these private contractual relations.

In its stall agreement with Fitzgerald, Mountain Laurel specifically reserved the right to terminate Fitzgerald's privileges, for any reason, on seventy-two hours notice. The racetrack management alone exercised that right because it suspected Fitzgerald's horses of racing inconsistently. The majority would transform this otherwise private act into state action because Mountain Laurel consulted with the racing judges and the secretary before making that decision.

The record indicates that the management of Mountain Laurel, upon suspecting Fitzgerald of driving inconsistent horses, took the only logical and prudent course available: they confirmed their suspicions with the persons designated

6. *See* Pennsylvania State Harness Racing Commission, Rules and Regulations, Rule 6, §§ 10-12, 23 (1977).

7. The record does not indicate that the Commission has authority, pursuant to this rule or any other rule, to discipline a driver or trainer because his horses had been racing inconsistently. Fitzgerald alleges only that his stall privileges were terminated because his horses were "inconsistent." *See* note 1 *supra.*

by the Commonwealth to monitor racing behavior—the racing judges. The record is totally barren, however, of any suggestion that the judges or the racing secretary told the track management to terminate Fitzgerald's stall privileges or even encouraged them to do so. Rather, the record shows only that the secretary and judges, when asked, confirmed Mountain Laurel's suspicions and that Mountain Laurel, alone, then made the decision to terminate the stall agreement.

Although the racing judges and secretary appear to have been involved in the discussions that resulted in Mountain Laurel's decision to terminate Fitzgerald's stall privileges, I cannot agree with the majority that this involvement transmutes the racetrack's act into state action. The Commission and the racetrack each have strong interests in ensuring that races are conducted properly and that drivers and horses perform fairly and competitively in each race. The Commission acts, pursuant to Rule 18, to discipline drivers engaged in a pattern of inconsistent driving in order to vindicate the sporting and betting public's interest in honest racing. At the same time, Mountain Laurel can be expected to use its independent authority—such as revocation of stall privileges—to remove from the track horses it suspects of inconsistent racing in order to protect its own integrity and goodwill.[8] The two actions are complementary, but this confluence of interests does not mean that the state's interests must swallow the private right. In short, Mountain Laurel's decision to terminate Fitzgerald's stall agreement was independently motivated and executed pursuant to its own, exclusive authority.

8. Over twenty years ago this Court recognized the importance of a private race track's interest in protecting its good reputation when it affirmed Chief Judge Forman's opinion in Martin v. Monmouth Park Jockey Club, 145 F. Supp. 439 (D. N.J. 1956), *aff'd*, 242 F.2d 344 (3d Cir. 1957). Judge Forman had noted:

> In a sport where the greatest importance should attach to dissipating any cloud of association with the undesirable, and in which the appearance as well as the fact of complete integrity is of paramount consideration, to exclude plaintiff from riding because of his record was an understandably warranted exercise of discretion.

Id. at 441.

The record is clear that Mountain Laurel itself, not the secretary or the judges, terminated the stall agreement. The track was without power to suspend Fitzgerald's license or to fine him, and neither the secretary nor the judges had any power to terminate his stall privileges. Although the track's decision was communicated to Fitzgerald by the racing secretary, the secretary in effect was acting as a messenger for his employer, the racetrack. The secretary possessed no power whatsoever to terminate the stall agreement between Fitzgerald and the track, or even to reprimand him for "driving inconsistent horses."[9] Moreover, Mountain Laurel in no way sought to invoke the authority of the Commission. Because Mountain Laurel, alone, possessed the power to terminate the stall agreement, its action—despite the involvement of the secretary and judges—remained private in nature.[10] Under these circumstances, I cannot agree that there was a close nexus between the state involvement—at most consultation and advice—and the challenged action of the regulated entity—an independently motivated decision based on Mountain Laurel's exclusive authority—such that the action of the latter may fairly be termed state action under *Jackson*.

My disagreement with the majority's application of the *Jackson* close nexus test to the facts of this case is under-

9. The record does not even establish that the Commission has any authority to deal with "inconsistent horses." Rather, the Commission's power appears to be limited to disciplining the driver for his own allegedly errant conduct. *See* note 7 *supra*.

10. It is for this reason that I am not persuaded by the testimony of the racing secretary, Kenneth Marshall, that is set forth in footnotes 11 and 12 of the majority's opinion. The majority cites this testimony as evidence that racing officials participated in the decision to terminate Fitzgerald's stall agreement. The testimony certainly established that Mountain Laurel consulted with racing officials in order to determine whether Fitzgerald had been driving inconsistent horses. There is no evidence, however, that the racing officials compelled or even encouraged Mountain Laurel to revoke Fitzgerald's stall privileges, or in any way urged Mountain Laurel to use its authority to terminate the stall agreement in order to further the Commission's own regulatory purposes under Rule 18. In the absence of this kind of state involvement, and because neither the judges nor the racing secretary possessed any regulatory authority to terminate the stall agreement, I do not believe that Mr. Marshall's testimony is dispositive.

scored by concern regarding the possible extension of this holding to analogous situations. Two examples illustrate my apprehension.[11]

Commercial banks are heavily regulated by state and federal governments, yet they remain essentially private entities. As private businesses, they may hire and discharge their employees without providing them with hearings. Part of the system of state and federal regulation of banking includes a statutory prohibition against willful misapplication of bank funds. Suppose that a bank suspects one of its vice presidents of violating this statute and asks the Treasury Department to investigate. The investigators conclude that the vice president has willfully misapplied bank funds in violation of the statute and meet with bank officials to inform them of their conclusions. At this meeting, the bank decides that the proper course is to refer the matter to the United States Attorney and to discharge the vice president. I read the majority's opinion as requiring the bank to abide by the procedural requirements of the fifth amendment's due process clause because the bank officers made their decision to discharge the vice president in conjunction with the Treasury Department investigators. It is also worth noting that in this situation, as in the present case, only the bank has the authority to discharge employees; the Treasury officials, even if they "participated" in the decision, could only advise the bank regarding their investigative findings.

Similarly, states extensively regulate casinos, particularly to ensure that undesirable elements do not come to control or manipulate the industry. Suppose a casino suspects an employee of fixing a roulette wheel or of having contacts with organized crime—matters that would violate state law—and asks state gaming inspectors to investigate. The investigation then confirms the casino's suspicions, and the general manager of the casino decides to discharge the employee based on his conversations with the investi-

11. These analogies are given only as illustrations. It should be noted that although these examples concern employer-employee relationships, in the present case Fitzgerald is not an employee of Mountain Laurel.

gators. Here again, I am troubled that the majority's opinion would require a finding of state action, because of the investigators' participation in the discharge decision.

Ironically, a finding of state action in these types of situations could well harm more employees, and persons like Fitzgerald, than it benefits. Employers can be expected to balk at adopting the panoply of procedures mandated by due process.[12] If consultation with regulatory officials brings about this burden, employers may be dissuaded from seeking advice from those in any way associated with governmental agencies before discharging employees suspected of impropriety. To the extent this occurs, there is a risk that more employees will be discharged summarily and erroneously than is the case today.[13]

In sum, I agree with the majority that the relationship between Pennsylvania and Mountain Laurel is such that not every act of the track is attributable to the state. I also agree that there is nothing in Mountain Laurel's exercise of the stall agreement revocation clause that, by its nature, implicates the state in that agreement or in the exercise of the rights enumerated therein. I disagree only with the majority's determination that there is a sufficient nexus of

12. Even if the employer is willing to sacrifice the additional time and expense necessitated by hearings, a neutral arbiter, transcripts, and representation by counsel in order to discharge an employee it believes to be dishonest, it may still be burdened by the standard of proof that is required before the "state" sanction may be imposed. Whereas a private party may cease dealing with, or discharge from its employ, one whom it suspects of illegal or immoral conduct, the state may not act against such a person where the evidence is not as great as would be required at a formal hearing. *See* Poisson v. State Harness Racing Comm'n, 287 A.2d 352, 855 (Common. Ct. 1972).

13. I am also apprehensive that litigants in future cases might attempt to extend today's decision to nonregulated industries. The majority does not define the nexus between the state's general regulation of harness racing and the racing officials' participation in Mountain Laurel's decision to terminate Fitzgerald's stall privileges. It might be inferred from this that the majority attaches no significance to the Commonwealth's general regulatory involvement in the industry. A future litigant thus might argue that a grocery store, or other small nonregulated business, that discharges an employee after confirming its suspicions of his criminal misconduct with local law enforcement officials should be held to the strictures of procedural due process. Although such an interpretation of the majority's opinion is plausible, I read the decision as being limited to industries in which the state has assumed regulatory authority over a wide range of operations.

state and private action when quasi-public officials participate in discussions that result in a business' decision to invoke its private contractual prerogatives.[14] In the present case, only Mountain Laurel, not the state, has acted so as to preserve the integrity of harness racing. Because I do not believe that its action is "properly attributable"[15] to the Commonwealth, I do not consider it to be state action under the federal Constitution or action under color of state law for purposes of section 1983.

II.

Inasmuch as I conclude state action is not present here —because Mountain Laurel did not terminate its stall agreement with Fitzgerald "under color of state law"— it would follow that Fitzgerald was not deprived of a constitutional right when the stall agreement was cancelled. The Constitution does not protect a citizen from a private party's acts simply because such acts might have the effect of depriving him of what would be recognized for other purposes as a cognizable "property" or "liberty" interest.

Even if state action may be predicated on the facts of this case, however, I question whether, consonant with applicable Supreme Court cases, Fitzgerald can demonstrate that what occurred here amounts to a deprivation of a "liberty" interest without due process of law. Both the district court and the majority base their conclusion to the contrary on the likelihood that the termination of the stall agreement because of the alleged inconsistency of his horses will "stigmatize" Fitzgerald and lead to the loss of a tangible interest, such as future employment possibilities. In this regard, they rely on Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); and Board of Regents v. Roth, 408 U.S. 564 (1971). None of these cases

14. Mountain Laurel succeeded only in ending Fitzgerald's stall agreement on seventy-two hours notice—a right given to it by that agreement. It did not seek to suspend or revoke Fitzgerald's state-issued license to race. Nor did it seek to fine him. Such courses were open, and remain open, to the racing judges and ultimately the Harness Racing Commission if they also believed that Fitzgerald, himself, had been racing inconsistently.

15. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978).

held, however, that the state's action created a stigma sufficient to raise a constitutional liberty interest. Although some of the language of these opinions may be helpful to Fitzgerald, the decisions, taken as a whole, do not provide much support. Moreover, the case for such a stigma cannot be easily articulated. First, there is considerable question regarding the extent of the alleged harm to Fitzgerald's reputation. The district court reasoned:

> In the instant case . . . impairment of future business opportunities to the plaintiff as a result of the defendants' acts has been alleged, and, we conclude the likelihood thereof sufficiently proved, because under Rule 23 § 8 of the Commission Rules and Regulations, the fact of plaintiff's expulsion *must* be communicated to the Commission, which in turn *must* communicate it to every racing association in the state of Pennsylvania, which virtually assures that all of plaintiff's potential clients will be aware of it.[16]

It is not at all obvious, however, that Rule 23, section 8 applies to Mountain Laurel's action here. Fitzgerald was not excluded from the track pursuant to the racing officials' delegated power to enforce Commission rules; rather, Mountain Laurel terminated his stall privileges. In fact, apparently believing that it was not acting in a manner requiring it to notify the Commission under Rule 23, section 8, Mountain Laurel did not report its decision regarding Fitzgerald to the Commission, and nothing in the record indicates that it ever intended to do so.[17]

Second, it is not clear, to me at least, that Fitzgerald even alleges that his reputation will be damaged. The complaint certainly was not premised on this theory. Paragraph 20 states that the charge of inconsistency was not

16. Slip Opinion of the District Court at 6.

17. Moreover, it is at least doubtful whether a stigma could be found even if such a report had been made. In Bishop v. Wood, *supra*, the charge was made that the false statements about the plaintiff would be repeated to prospective employers. Still, the Supreme Court declared that no stigma was present, in part because there was no *public* announcement of the alleged false reasons for the discharge. 426 U.S. at 348.

based on "any discrepancy or inconsistency of the plaintiff but . . . solely due to the allegation of inconsistency of the three horses."[18] Paragraph 24 adds that Mountain Laurel "has not formally charged plaintiff with any form of wrongdoing."[19] Similarly, the affidavit filed in support of the complaint asserts in paragraph 3: "It must be carefully noted that at no time has said plaintiff been accused of misconduct, specific or otherwise."[20] Thus, Fitzgerald's theory was not that a stigma would attach to him, but that the relatively few harness racing tracks in the area afforded Mountain Laurel a virtual monopoly over the sport, and that Mountain Laurel's termination of the stall agreement had the effect of depriving him of the opportunity to make a living.

Finally, Fitzgerald does not assert that the charge of driving inconsistent horses was false. It may be doubted whether statements made by a state official can be said to defame or stigmatize one's reputation so as to implicate a constitutionally protected interest when the truth of such statements is not called into question. Although Fitzgerald does not concede that he has driven inconsistent horses, neither does he allege that Mountain Laurel's actions were defamatory or untrue.

In light of these weaknesses in Fitzgerald's claim that he was deprived of a "liberty" interest, I am inclined to doubt whether Fitzgerald could prevail even if state action were established. Inasmuch as I reject the conclusion that state action is present, however, I have no occasion to address definitively the likelihood of Fitzgerald's ultimate success in this regard.

III.

Putting aside my disagreement with the majority's resolution of the state action question and my reservations about the merits of Fitzgerald's due process claim, I also

18. App. 9a.

19. App. 11a.

20. App. 15a.

believe that the district court failed to adhere to the rules of this Court governing the issuance of preliminary injunctions.[21] First, as discussed in part II above, I believe that Fitzgerald has not demonstrated that he is reasonably likely to prevail on his claim. Second, I am not convinced that Fitzgerald has shown irreparable injury to himself or that Mountain Laurel and the public will be injured less by the injunction than Fitzgerald would be without it. There is no indication that the district court balanced Fitzgerald's interest in retaining his stall privileges against the racetrack's and the public's interests in ensuring that all races are, and appear to be, run competitively.[22] Third, the duration of the preliminary injunction extends beyond the term of the stall agreement, which expired November 11, 1978. Mountain Laurel is ordered, pending further action by the district court, to issue a stall permit to Fitzgerald, upon the latter's request, for future racing seasons, even though Fitzgerald's rights under the stall agreement were specifically limited to the 1978 season. Therefore, the preliminary injunction extends beyond the period of time necessary to preserve the status quo ante and improperly forces Mountain Laurel to issue a permit to a person whom it otherwise has the legal right to refuse.

Because I would reverse the judgment of the district court and dissolve the preliminary injunction, I respectfully dissent.

21. In Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919-20 (3d Cir. 1974), the Court reiterated the long-standing rule that, before issuing a preliminary injunction, a district court must find that plaintiff would suffer irreparable injury if the injunction is not granted, and that plaintiff is reasonably likely to prevail on the merits. In addition, the court must balance the possibility of harm to the defendant from the grant or denial of the relief, and consider the public interest as well.

22. *See* note 8 *supra*.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2460

WILLIAM FITZGERALD

v.

MOUNTAIN LAUREL RACING INC., KENNETH MARSHAL and JOHN KNIGHT, Presiding Judge,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(C. A. No. 78-0930)

Argued June 7, 1979

Before: ADAMS and ROSENN, *Circuit Judges*, and LACEY, *District Judge.**

ORDER AMENDING DISSENTING OPINION

It is ORDERED that the dissenting opinion filed September 26, 1979 in the above matter be and is hereby amended as follows:

Footnote 5:

Add the following material to the bottom of this footnote:

*Honorable Frederick B. Lacey, District Judge for the District of New Jersey, sitting by designation.

Moreover, if the Court in *Jackson* declined to treat the power company, which exercised monopolistic control over two basic services — the supply of gas and electricity — as if it were the state, it is doubtful whether it would hold the activities of a private racetrack to be state action. *See generally* Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 Wash. U. L. Q. 755, 774-80.

By the Court,

ARLIN M. ADAMS
Circuit Judge

Dated: November 26, 1979

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.) 55

William FITZGERALD, Plaintiff

v.

MOUNTAIN LAUREL RACING INC., Kenneth Marshall, and John Knight, Presiding Judge, Defendants.

No. 78-930 H.

United States District Court, W. D. Pennsylvania.

January 22, 1979.

OPINION

DIAMOND, District Judge.

I

Plaintiff, a harness horse driver and trainer, brought this action under the Civil Rights Act of 1871, 42 U.S.C.A. § 1983, for injunctive relief on the grounds that the defendants violated his right to due process under the Fourteenth Amendment of the United States Constitution when they suspended him from driving

and training horses at the Meadows Racetrack in Washington County, Pennsylvania.

Plaintiff's petition for a temporary restraining order was refused and a hearing was held, after which a preliminary injunction was issued by an order which provided in part as follows:

> "[T]he court finds that the prerequisites to the issuance of an injunction . . . have been met in this case, to-wit that plaintiff will suffer irreparable harm if the requested relief is not granted; that said harm outweighs any injury that may visit the defendants or the public generally; and that plaintiff has shown a sufficient likelihood of prevailing on the merits of his claim.
>
> ". . .
>
> "An opinion with underlying findings of fact and conclusions of law will follow."

The bases for the court's conclusion that the prerequisites to the issuance of

the preliminary injunction were met are set forth below.

II

1. Prior to August 19, 1978, the plaintiff was duly licensed by the Pennsylvania State Harness Racing Commission (Commission) as a trainer of harness racing horses in the Commonwealth of Pennsylvania.

2. At all times pertinent, the defendant Mountain Laurel Racing Inc. (Mountain Laurel) was a racing association incorporated in and under the laws of the Commonwealth of Pennsylvania for the purpose of conducting racing meets at the Meadows Racetrack (Meadows) in Meadowlands, Washington County, Pennsylvania.

3. Defendant Kenneth Marshall was an employee of Mountain Laurel and worked at

the Meadows as Racing Secretary at all times pertinent.

4. Defendant John Knight was an employee of Mountain Laurel and worked at the Meadows as Presiding Judge at all times pertinent.

5. On Saturday, August 19, 1978, the plaintiff was informed by defendant Marshall that based on discussions with the track judges Mountain Laurel had decided to suspend plaintiff from training and driving horses at the Meadows and to expel him from the track because of "inconsistent driving."

6. "Inconsistent driving" is a violation of Rule 18, § 5(c)(2) of the Rules and Regulations of the Commission.

7. Plaintiff received no prior notice of the suspension and was not afforded any hearing.

8. Prior to his suspension plaintiff had eleven horses stabled at the Meadows, which he trained and raced there.

9. Plaintiff was paid by the owners of these horses to stable, board, train, and race them, and both the amount of his compensation as well as his ability to obtain horses for the aforesaid purposes was based, inter alia, on the performance at races at the track of the horses handled by the plaintiff.

10. Plaintiff was unable to transport the aforesaid horses to another track and thereby continue pursuit of his occupation at the time of his suspension because (1) other reasonably accessible tracks had finished their meets, or (2) plaintiff's horses could not qualify to race in those meets which were still in progress.

III

In Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917 (3rd Cir., 1974), the court held that the factors which control the issuance of an injunction and which the court must consider and balance are whether:

(1) Plaintiff will suffer irreparable harm if relief is not granted.

(2) The defendant will be harmed if relief is granted.

(3) The public generally will be harmed if relief is granted.

(4) Plaintiff is likely to prevail on the merits of his claim.

We conclude that the plaintiff will suffer irreparable harm if relief is not granted because the nature of his business

is such that no adequate remedy exists at law to compensate him for the loss he will sustain if he is unlawfully suspended from driving at the Meadows. Plaintiff's income as a trainer-driver of harness racing horses is derived from three different sources: (1) a percentage of the purses earned by horses he drives (2) a percentage of the purses earned by horses he trains and (3) a flat fee for the horses he trains. Clearly, the first two sources of income are directly related to the outcome of races in which plaintiff is involved as a driver or trainer. And, to some extent at least, an owner's decision to entrust his horses to plaintiff for training and driving is based upon plaintiff's past success as a trainer, and driver, so that the third source is also somewhat dependent upon plaintiff's

success at the finish line. It appears, therefore, that a court or jury in attempting to calculate damages at law for the plaintiff would have to determine how often plaintiff's horses would have been victorious or, at least "finished in the money." Needless to say, this would be a highly speculative endeavor at best, and, at worst, practically an impossible one. Barchi v. Sarafan, 436 F. Supp. 775 (S.D.N.Y. 1977). Further, it would be virtually impossible to calculate the ultimate loss to plaintiff's business and reputation from the fact alone that he was suspended from driving at a licensed racetrack for violation of a Commission rule which implies dishonest racing, as we find "inconsistent driving" does.

The second and third factors may be considered together in this case. While

the defendants maintain that both their interest and that of the public will be adversely affected if relief is granted because this will cause their patrons' faith in the integrity of harness racing at the Meadows to be eroded, no proof was offered in support of this allegation. Therefore, we cannot find that it exists at all and obviously cannot conclude that it is sufficient to outweigh the substantial harm which plaintiff has shown he will probably suffer.

The final factor, namely, the likelihood that plaintiff will prevail on the merits, poses more difficult questions. Plaintiff claims that his expulsion and suspension constitute a deprivation of his liberty or property rights without due process of law in violation of the Fourteenth Amendment to the United States

Constitution and the Civil Rights Act of 1871, 42 U.S.C.A. § 1983. In order to prevail on the merits, plaintiff will have to establish: (1) that he was deprived of a liberty or property interest within the meaning of the Fourteenth Amendment, (2) that the deprivation was without due process, and (3) that the deprivation was done by the state or under color of state law; i.e., that there was "state action."

We first consider whether there was a deprivation of a liberty or property interest within the meaning of those terms in Fourteenth Amendment context. Plaintiff asserts that his right to race and train horses at the Meadows constitutes both a liberty and property interest under the Fourteenth Amendment. The defendants contend that it is neither.

To determine whether or not the right to race and train horses is "property" under the due process clause, this court, following the Supreme Court's direction in Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), would have to construe the nature of the right conferred on harness track licensees by the applicable Pennsylvania law, Section 9 of the act of December 22, 1959, P.L. 1978 as amended 1968, July 31, P.L. 857, No. 254, § 1, 15 P.S. § 2609(a). However, it is unnecessary to determine the "property" interest question, since, in our view the injury to plaintiff's reputation resulting from defendants' conduct constitutes the deprivation of a liberty interest.

It has long been recognized that the right to one's good reputation may come within the protection of the Fourteenth

Amendment, but rulings of the Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); and Bishop v. Wood, supra, have made it clear that the right to one's good reputation alone is not sufficient to raise a due-process protection. Rather, there must be a showing of "reputation--plus;" i.e. that the stigma suffered will, with some degree of probability, lead to the loss of another tangible interest such as employment.

The petitioners in Roth and Paul were denied relief because they failed to allege and prove that their future employment prospects would be injured. And in Bishop, where a police officer was

dismissed by a city manager for unsatisfactory performance and an allegation of future injury was made, the Court denied relief because it appeared that the probability of the additional injury materializing was slight in view of the fact that the city manager communicated the reasons for the dismissal to the officer privately and did not publicize them further.

In the instant case, however, the impairment of future business opportunities to the plaintiff as a result of the defendants' acts has been alleged, and, we conclude the likelihood thereof sufficiently proved, because under Rule 23 § 8 of the Commission Rules and Regulations, the fact of plaintiff's expulsion must be communicated to the Commission, which in turn must communicate it to every racing association in the state of Pennsylvania,

which virtually assures that all of plaintiff's potential clients will be aware of it.

We next consider the question of due process. Both the plaintiff and defendant Marshall testified that plaintiff's expulsion and suspension on the evening of August 19, 1978, were preceded by neither a hearing nor any notice of charges. While the Supreme Court has on occasion upheld deprivation of liberty or property rights not preceded by notice and hearing, Dixon v. Lover, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Bob Jones University v. Simon, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), the presumption is that due process requires a prior hearing unless there exists some extenuating

private or public interest of overriding significance that justifies postponement. Boddie v. Connecticut, 401 U.S. 371, at 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Typically, those extenuating circumstances consist of administrative or practical inconvenience. No evidence was offered in the instant case to even suggest that a prior hearing would have been burdensome or for any reason contraindicated by some particular factor or circumstance. In fact, it appears that plaintiff was not even offered a subsequent hearing at the time he first was advised of his suspension--a requirement in those cases which uphold a deprivation without prior hearing because of some overriding private or governmental interest. We conclude, therefore, that plaintiff was not accorded due process.

As to the existence of state action, plaintiff contends that his suspension and expulsion from the Meadows was "under color of state law" even though the ousting party was a private racing association instead of the state agency, the Commission itself. In support of this, plaintiff relies primarily on the fact that in Pennsylvania, racing associations, along with the rest of the harness racing industry, are extensively regulated by the state, that the Commission has granted defendant Mountain Laurel a virtual monopoly over racing in a substantial area of the state, and that broad law enforcement powers are delegated to the defendants by statute.

On the other hand, defendants argue that their action was strictly private in character. First, they contend that the

expulsion of plaintiff was done under the provisions of an "Application for Stall Space," a type of lease executed by Mountain Laurel and plaintiff which, according to defendants, reserved to Mountain Laurel the right to expel plaintiff from any and all facilities at the Meadows for any reason. Notwithstanding that the reason specified for plaintiff's expulsion and suspension was inconsistent driving, which is a violation of the Rules and Regulations of the Commission, the defendants maintain that their conduct no more had the imprimatur of state involvement than that of any other landlord who evicts an undesirable tenant. The defendants argue, further, that the presence of extensive state regulation and monopoly status are insufficient to convert their otherwise private business and conduct into state

action, and cite Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) in support of this.

In Jackson the Court found that no state action was involved where a Pennsylvania utility company terminated service to a customer without prior notice and hearing. The fact that the state may have conferred monopoly status upon defendant was found to be insufficient to support a finding of state action since there was insufficient relationship between the challenged action of the entity involved and its monopoly status. 419 U.S. at p. 352, 95 S.Ct. 449. The court concluded that in the absence of a closer nexus between the state and the challenged activity, the fact of extensive state regulation would not in itself

convert the utility's action into that of the state and even though the utility did submit a broad tariff to the state containing a provision explaining the utility's termination rights, it could not be said that the State "authorized and approved" the practice, since the provision was given minimal scrutiny at best. 419 U.S. at pp. 354-5, 95 S.Ct. 449.

We believe that "state action" was present in the instant case and that this conclusion is consistent with Jackson. Pennsylvania's relationship with private racing associations appears to be decidedly more "symbiotic," Jackson, supra, 419 U.S. at p. 357, 95 S.Ct. 449, than it is with public utilities. We note, for example, that under Rule 26 § 11 of the Commission's Rules and Regulations, racetrack judges, who are employees of the

racing associations and not of the state and who were the persons at whose suggestion plaintiff was suspended are expressly empowered to enforce Commission rules governing the conduct of those directly involved in race meets; e.g., drivers, trainers, owners, employees of the racetrack.

Further, under Pennsylvania law, 15 P.S. § 2610.1, broad powers are conferred on racing associations to regulate the conduct of patrons of the track, including the right to employ security personnel with the "powers and duties of a peace officer" to enforce the criminal laws of the Commonwealth within the race meeting grounds or enclosure. They also are given the right to eject from the track any person whose presence is in their "sole judgment" inconsistent with the best

interest of harness racing, and one so ejected is subject to fine or imprisonment if subsequently found at the track.[1]

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[1]For convenience, we set forth 15 P.S. 2610.1 in its entirety.

§ 2610.1 Security personnel; powers and duties

The State Harness Racing Commission and any association licensed by the commission is hereby authorized and empowered to employ persons as security personnel. These persons shall possess the powers and duties of a peace officer with respect to the enforcement of the criminal laws of the Commonwealth within the race meeting grounds or enclosure. Such designated persons are also authorized and empowered to interrogate and eject from the race meeting grounds or enclosure any persons suspected of violating any rule or regulation promulgated by the State Harness Racing Commission. The State Harness Racing Commission and any association licensed by the commission may refuse admission to and eject from enclosure of the race track operated by any association, any person whose presence there is, in the sole judgment of the association or commission, inconsistent with the orderly or proper conduct of a race meeting

[Footnote continued on next page]

In these matters, racing associations and their employees are not only acting as agents of the state but as deputies thereof. And certainly nothing is more uniquely "state action," than the enforcement of its criminal laws.

Unlike Jackson, the state here has specifically approved and authorized suspensions of racing related privileges by

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[Footnote continued from previous page]

or whose presence or conduct is deemed detrimental to the best interest of harness racing. A person so refused admission or so ejected shall have all rights of appeal provided for under this act. A licensee may not refuse admission to or eject a law enforcement official. A person found within a race track enclosure after having been refused admission thereto or ejected therefrom shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding one thousand dollars ($1000) or undergo imprisonment for a term not exceeding six months, or both. (Emphasis supplied)

private persons, and, in fact, has completely delegated this authority. Furthermore, to the extent that the deputizing of privately-employed persons obviates the need of the Commission to hire additional enforcement personnel, the state has placed itself in the position of interdependence that the Court found absent in Jackson, 419 U.S. at pp. 357-8, 95 S.Ct. 449, but deemed controlling in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

As previously noted, the defendant Marshall testified that plaintiff was suspended because defendants felt that he had violated Commission Rule 18 § 5(c)(2) dealing with inconsistent driving, and, of course, the state has authorized such private persons to enforce Commission

rules. The defendants maintain, nevertheless, that they expelled and suspended plaintiff by authority of the eviction clause in the lease for stall space. The parties agreed, however, that rental of stall space was not a prerequisite to driving and training horses at the Meadows and that many active drivers and trainers there keep their horses at stalls not controlled by Mountain Laurel. So, defendants, while claiming to have acted under a contractual right to evict plaintiff from stalls and facilities he rented, cited Commission rule violations when they acted, went far beyond a simple eviction from rented space, and now seek to prevent injunctive relief by citing the harm which will result if plaintiff is permitted to continue driving horses at the Meadows, a

right not at all dependent on the rental of stall space.

It is clear to us, therefore, that plaintiff was suspended and evicted for allegedly violating a rule of the Pennsylvania State Harness Commission, an agency of the Commonwealth of Pennsylvania, that the defendants were specifically authorized by the state to enforce this rule, and that the asserted concurrent basis of private authority neither attenuates nor mitigates these facts.

Finally, defendants argue that notwithstanding any other consideration, plaintiff's claim will fail on the merits because he did not exhaust his administrative remedies as he was required to do as a prerequisite to this suit. We disagree. See U. S. ex rel. Ricketts v.

Lightcap, 567, F.2d 1226, 1229 (3rd Cir., 1977).

We conclude, accordingly, that plaintiff has demonstrated sufficient likelihood of prevailing on the merits.

The foregoing discussion of the merits of plaintiff's claim is, of course, not a final determination. As previously stated, a petitioner seeking preliminary injunctive relief need only show a likelihood of prevailing on the merits. And it is well settled that the degree of likelihood a court should require will vary depending upon the relative injury faced by the interested parties. See cases listed by Wright and Miller, Federal Practice and Procedure, at Volume II, Page 453, n. 60. In this case the balance of harm weighs decidedly in plaintiff's favor. Thus, while it may be that at a

trial on the merits, should one be had, plaintiff will actually fail to establish his case, the court believes that a sufficient showing of probable success has been made at this time.

IN THE DISTRICT COURT
FOR THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FITZGERALD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 78-930 H
	)	
MOUNTAIN LAUREL RACING, INC., KENNETH MARSHALL, and JOHN KNIGHT, PRESIDING JUDGE,	)	
	)	
Defendants.	)	

ORDER OF COURT

AND NOW, to-wit, this 31st day of August, 1978, after consideration of plaintiff's complaint seeking injunctive relief, plaintiff's affidavit in support of said complaint, defendants' admissions with regard to certain allegations of said complaint, and testimony offered at a

hearing in open court on August 28, 1978, the court finds that the prerequisites to the issuance of an injunction as set forth in Delaware River Port Authority, et. al. v. TransAmerican Trailer Transport Inc., 501 Fed.2d 917 (1974) have been met in this case, to-wit that plaintiff will suffer irreparable harm if the requested relief is not granted; that said harm outweighs any injury that may visit the defendants or the public generally; and that plaintiff has shown a sufficient likelihood of prevailing on the merits of his claim.

WHEREFORE, IT IS ORDERED that a preliminary injunction, be and it hereby is granted plaintiff against the defendants, their agents, servants, employees and attorneys, and all persons in active consort or participation with them, restraining

them, pending the final determination of this action or until further order of this court, from denying to the plaintiff the right to stall horses, drive horses, train horses, and make any other use of the facilities which plaintiff enjoyed prior to the action taken by the defendants on Saturday evening, August 19, 1978, when the defendant, Kenneth Marshall, Racing Secretary, advised plaintiff that plaintiff had 72 hours, excluding Sunday from said date to vacate the premises leased by defendant, Mountain Laurel Racing, Inc., at the Meadows Racetrack located at Race Track Road, Meadowlands, Washington County, Pennsylvania, provided that plaintiff forthwith give a bond, or a cash deposit, in the sum of $500.00 for the payment of such costs and damages as may be incurred or suffered by

any party who shall be found to have been wrongfully enjoined or restrained, and such bond shall be approved by the court or by the Clerk of this Court. An opinion with underlying findings of fact and conclusions of law will follow.

/s/ Gustave Diamond
United States District Court

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